

BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of)

MUR 6794)

Emmer for Congress)

and Jennifer Niska, as treasurer¹)

Thomas Emmer)

Integrity Exteriors and Remodelers, Inc.)

Renters Warehouse²)

DISMISSAL AND

CASE CLOSURE UNDER THE

ENFORCEMENT PRIORITY

SYSTEM

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GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include, without limitation, an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and developments of the law. It is the Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances.

The Office of General Counsel has scored MUR 6794 as a low-rated matter and has determined that it should not be referred to the Alternative Dispute Resolution Office.³ For the reasons set forth below, the Office of General Counsel recommends that the Commission dismiss the allegations that Emmer for Congress and Jennifer Niska, in her official capacity as treasurer, (the "Committee"), Thomas Emmer, Integrity Exteriors and Remodelers, Inc. ("Integrity"), and Renters

¹ Karin Housley was treasurer of the Committee at the time of the Complaint and the Committee's response. On June 2, 2014, the Committee filed an amended Statement of Organization naming Jennifer Niska as treasurer.

² Renters Warehouse was inadvertently not notified of the Complaint. See 52 U.S.C. § 30109(a)(1).

³ The EPS rating information is as follows: Complaint Filed: March 11, 2014. Response from Thomas Emmer and Emmer for Congress for Congress Filed: April 25, 2014; Response from Integrity Exteriors and Remodelers, Inc. Filed: April 23, 2014.

1 Warehouse violated the Act or Commission regulations.⁴

2 The Complaint alleges that the Committee accepted a prohibited in-kind corporate
3 contribution from Integrity when Emmer appeared in its television and internet advertisement to
4 recommend Integrity. In the video, Emmer states that he is a candidate for Congress and stands in
5 front of an "Emmer for Congress" sign that contains a printed disclaimer reading "Paid for by
6 Emmer for Congress." Compl. at 2-5. In addition, the Complaint implies that Renters Warehouse
7 made in-kind corporate contributions when Emmer appeared in its infomercials that aired at least
8 five times after he became a candidate and appeared as a special guest at its "Cocktails and
9 Conversation" event after Emmer became a candidate. *Id.* at 5-6.

10 The Committee and Integrity deny that any prohibited contribution resulted from the
11 advertisement. Committee Resp. at 1-2, 5; Integrity Resp. at 1-3. The Committee asserts that
12 Emmer filmed a testimonial regarding the quality of Integrity's work at Integrity's request, but
13 claims that Integrity was not authorized to broadcast it, and upon learning that the ad was being
14 aired, the Committee directed Integrity to stop. Committee Resp. at 3, David FitzSimmons Aff. at 1.
15 Integrity states that it aired the ad without the Committee's knowledge or approval, and states that
16 the ad did not contain express advocacy. Integrity Resp. at 3. Respondents state that after the
17 Committee learned of the ad on September 29, 2013, the Committee requested an invoice for the
18 costs of airing the ad, Integrity promptly sent an invoice for \$850, and the Committee paid it on
19 October 14, 2013. Committee Resp. at 3, Ex. A at 11; Integrity Resp. at 1. Thus, respondents deny
20 the ad met the definition of a coordinated communication because the Committee paid for it.
21 Committee Resp. at 5; Integrity Resp. at 3.

⁴ Emmer for Congress was the principal campaign committee in 2014 for Congressman Thomas Emmer, the current representative for Minnesota's 6th Congressional District.

As to the Renters Warehouse infomercial, the Committee states that it was created before Emmer became a candidate, asserts that it does not satisfy the content prong of the Commission's coordinated communication regulations, and states that at the Committee's request, Renters Warehouse stopped airing the infomercial after Emmer became a candidate. Committee Resp. at 2-3, 5. The Committee asserts that Emmer attended the "Cocktails and Conversation" event as a radio station host, not in connection with his recently announced candidacy. Committee Resp. at 2-3. The respondents argue that any potential violations are *de minimis*. Committee Resp. at 1; Integrity Resp. at 4.

Corporations are prohibited from making contributions to federal candidates, and candidates are prohibited from knowingly accepting them.⁵ A contribution is "anything of value made by any person for the purpose of influencing an election for Federal office."⁶ The term "anything of value" includes in-kind contributions.⁷ When a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, the communication must include a proper disclaimer.⁸ All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate must also include a proper disclaimer.⁹ Political committees are required to report contributions they receive.¹⁰

The available information indicates that Integrity's television ad which identified Emmer as a candidate, and included a sign reading "Emmer for Congress," triggered the Act's disclaimer

⁵ 52 U.S.C. § 30118(a); 11 C.F.R. §§ 114.2(a), (d).

⁶ 52 U.S.C. § 30101(8).

⁷ 11 C.F.R. § 100.52(d)(1). Additionally, a third party's communication that is coordinated with a candidate is considered to be an in-kind contribution if it meets the criteria set forth in 11 C.F.R. §§ 109.21(b)-(d).

⁸ 52 U.S.C. §§ 30120(a)(1), 30120(d)(1)(B); 11 C.F.R. §§ 110.11(b)(1), 110.11(c)(3)(ii)-(iii).

⁹ 52 U.S.C. §§ 30120(a)(2)-(3), 30120(d)(2); 11 C.F.R. §§ 110.11(b)(2)-(3), 110.11(c)(4).

¹⁰ 52 U.S.C. § 30104(b)(2).

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1 requirements.¹¹ There is also information in the record that suggests that the ad qualified as an in-
2 kind contribution.¹²

3 The facts here, including the apparent *de minimis* amounts at issue, support dismissing this
4 claim as a matter of prosecutorial discretion. Although Integrity's ad may have been an in-kind
5 contribution, and it lacked a disclaimer saying that Integrity paid for it, Integrity apparently only ran
6 it briefly before pulling it from the air at Emmer's request. Respondents also attest that all costs
7 associated with the ad totaled \$850. We have viewed the ad, and it appears to be an unsophisticated
8 ad for a small, local business, thus, we believe that the costs associated with creating and
9 broadcasting the ad were modest. Further, the Committee promptly reimbursed Integrity for the
10 costs of the ad.

11 As for the Renters Warehouse infomercial, the Committee denies that it satisfies any content
12 standard of the coordinated communication test,¹³ and there is no evidence in the record to the
13 contrary. Further, it appears that the costs associated with the "Cocktails and Conversations" event
14 were likely small. Accordingly, based on the apparently small amounts at issue in this matter, and in
15 furtherance of the Commission's priorities relative to other matters pending on the Enforcement
16 docket, the Office of General Counsel recommends that the Commission exercise its prosecutorial

¹¹ See 11 C.F.R. § 100.22(a) (listing "Smith for Congress" as an example of a phrase containing express advocacy).

¹² There is information in the record supporting an inference that the ad may have met the definition of a coordinated communication. Specifically, Integrity created and initially paid for the ad, the ad appears to be a public communication containing express advocacy, and Emmer filmed a video testimonial at Integrity's request. 11 C.F.R. §§ 109.21(a)(1) (paid for by a person other than the candidate or authorized committee); 109.21(c)(3) (a public communication that expressly advocates for the election of a candidate); 109.21(d)(1)-(3) (the communication is created by another person and the candidate assents to the creation of the communication; the candidate is materially involved regarding the content of the communication; and the communication is created after the person paying for the communication and the candidate who is clearly identified in the communication have engaged in one or more substantial discussions about the communication). See also 11 C.F.R. § 109.21(d) (any of the listed types of conduct satisfy the conduct standard whether or not there is agreement or formal collaboration); and 109.21(e) (agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication is not required for a communication to be a coordinated communication).

¹³ 11 C.F.R. § 109.21(c).

discretion and dismiss the allegations pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).
We also recommend that the Commission approve the attached Factual and Legal Analysis, close the
file as to all respondents, and send the appropriate letters.

RECOMMENDATIONS

1. Dismiss the allegation that Emmer for Congress and Jennifer Niska, in her official capacity as treasurer, Thomas Emmer, Integrity Exteriors and Remodelers, Inc., and Renters Warehouse violated the Act and Commission regulations, pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985);
2. Approve the attached Factual and Legal Analysis and the appropriate letters; and
3. Close the file as to all respondents.

Daniel A. Petalas
Acting General Counsel

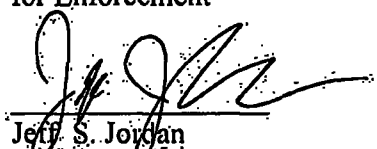
Kathleen M. Guith
Acting Associate General Counsel
for Enforcement


8.16.16

Date

BY:


Stephen Gura
Deputy Associate General Counsel
for Enforcement


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Assistant General Counsel
Complaints Examination and
Legal Administration


Donald E. Campbell
Attorney
Complaints Examination and
Legal Administration

Attachment:
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Emmer for Congress MUR 6794
and Jennifer Niska, as treasurer¹
Thomas Emmer
Integrity Exteriors and Remodelers, Inc.
Renters Warehouse²

I. INTRODUCTION

This matter was generated by a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations by Emmer for Congress and Jennifer Niska, in her official capacity as treasurer, (the "Committee"), Thomas Emmer, Integrity Exteriors and Remodelers, Inc. ("Integrity"), and Renters Warehouse. It was scored as a low-rated matter under the Enforcement Priority System, by which the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The Complaint alleges that the Committee accepted a prohibited in-kind corporate contribution from Integrity when Emmer appeared in its television and internet advertisement to recommend Integrity. In the video, Emmer states that he is a candidate for Congress and stands in front of an "Emmer for Congress" sign that contains a printed disclaimer reading "Paid for by Emmer for Congress." Compl. at 2-5. In addition, the Complaint implies that Renters

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² Renters Warehouse was inadvertently not notified of the Complaint. See 52 U.S.C. § 30109(a)

1 Warehouse made in-kind corporate contributions when Emmer appeared in its infomercials that
2 aired at least five times after he became a candidate and appeared as a special guest at its
3 “Cocktails and Conversation” event after Emmer became a candidate. *Id.* at 5-6.

4 The Committee and Integrity deny that any prohibited contribution resulted from the
5 advertisement. Committee Resp. at 1-2, 5; Integrity Resp. at 1-3. The Committee asserts that
6 Emmer filmed a testimonial regarding the quality of Integrity’s work at Integrity’s request, but
7 claims that Integrity was not authorized to broadcast it, and upon learning that the ad was being
8 aired, the Committee directed Integrity to stop. Committee Resp. at 3, David FitzSimmons Aff.
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18 Commission’s coordinated communication regulations, and states that at the Committee’s
19 request, Renters Warehouse stopped airing the infomercial after Emmer became a candidate.
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21 Conversation” event as a radio station host, not in connection with his recently announced
22 candidacy. Committee Resp. at 2-3. The respondents argue that any potential violations are *de*
23 *minimis*. Committee Resp. at 1; Integrity Resp. at 4.

B. Legal Analysis

Corporations are prohibited from making contributions to federal candidates, and candidates are prohibited from knowingly accepting them.³ A contribution is “anything of value made by any person for the purpose of influencing an election for Federal office.”⁴ The term “anything of value” includes in-kind contributions.⁵ When a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, the communication must include a proper disclaimer.⁶ All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate must also include a proper disclaimer.⁷ Political committees are required to report contributions they receive.⁸

The available information indicates that Integrity’s television ad which identified Emmer as a candidate, and included a sign reading “Emmer for Congress,” triggered the Act’s disclaimer requirements.⁹ There is also information in the record that suggests that the ad qualified as an in-kind contribution.¹⁰

³ 52 U.S.C. § 30118(a); 11 C.F.R. §§ 114.2(a), (d).

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⁸ 52 U.S.C. § 30104(b)(2).

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15 dismisses the allegations pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

the person paying for the communication and the candidate who is clearly identified in the communication have engaged in one or more substantial discussions about the communication). *See also* 11 C.F.R. § 109.21(d) (any of the listed types of conduct satisfy the conduct standard whether or not there is agreement or formal collaboration); and 109.21(e) (agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication is not required for a communication to be a coordinated communication).

¹¹ 11 C.F.R. § 109.21(c).